

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

JOHN OLIVEIRA,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 02-303 T
	:	
JACK EVANS,	:	
GERHARD OSWALD,	:	
TOWN OFFICIALS,	:	
Defendants. <sup>1</sup>	:	

**REPORT AND RECOMMENDATION**

David L. Martin, United States Magistrate Judge

Before the court is Plaintiff John Oliveira's Motion and Affidavit Attached for Summary Judgment Based on 20 Day Rule (Document #37) ("Plaintiff's Motion for Summary Judgment" or the "Motion"). Pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a), this matter has been referred to me for preliminary review, findings, and recommended disposition. The court has determined that no hearing is necessary. For the following reasons, I recommend that Plaintiff's Motion for Summary Judgment be denied.

Although Plaintiff has styled the Motion as being a motion for summary judgment, it is more properly viewed as a motion for default as it is based on Defendants' alleged failure to file a response to the Amended Complaint. See Plaintiff's Motion for Summary Judgment at 2; see also Fed. R. Civ. P. 55(a). A default is not favored. See Farnese v.

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<sup>1</sup> In the Amended Complaint (Document #11), Plaintiff spells the last name of Defendant Evans as "Evan" and the first name of Defendant Oswald as "Gerhald." Amended Complaint at 1. The court has corrected the spellings to "Evans" and "Gerhard."

Bagnasco, 687 F.2d 761, 764 (3<sup>rd</sup> Cir. 1982)(pointing out default not favored and in close case doubts should be resolved in favor of setting aside default and obtaining decision on merits); Dizzley v. Friends Rehab. Program, Inc., 202 F.R.D. 146, 147 (E.D. Pa. 2001)("[T]he entry of a default is not favored, and the court should employ a standard of liberality that resolves all doubts in favor of the defaulting party.")(internal quotation marks omitted).

This Magistrate Judge has already determined that Plaintiff's claims are meritless and that summary judgment should enter in favor of Defendants. See Report and Recommendation dated 5/9/03 (Document #41) at 23 (recommending that Defendants' Motion for Summary Judgment be granted). In reaching that conclusion, the court considered and rejected the arguments made by Plaintiff in the present Motion. See id. at 21-23. Plaintiff contended that the lack of a timely answer to the Amended Complaint rendered Defendants' Motion for Summary Judgment moot and that judgment should enter in his favor,<sup>2</sup> but the court disagreed. See id. at 21 (citing Plaintiff's Motion for Summary Judgment at 2). The court noted that it had discretion to grant additional time to Defendants to file a response, that Defendants had not ignored the original Complaint but filed an Answer, that default had not entered at the time Defendants' Motion for Summary Judgment was filed, that Plaintiff had not shown any prejudice resulting from Defendants' late response, that Plaintiff's

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<sup>2</sup> Plaintiff's actual language was that the "[c]ourt is bound to dismiss in favor of Plaintiff and award all cost to Plaintiff." Plaintiff's Motion for Summary Judgment at 2. The court interprets this as a being a request by Plaintiff for entry of judgment in his favor.

filings had at times been incoherent and confusing and may have contributed to Defendants' failure to file a response, and that Plaintiff's claims lacked merit. See id. at 23. All of these considerations remain valid, and they weigh heavily in favor of denying Plaintiff's Motion.

In addition, Defendants have now submitted evidence that on October 9, 2002, they mailed an answer to the Amended Complaint to the Clerk's Office and a copy to Plaintiff. See Memorandum in Support of Defen[d]ants' Objection to Plaintiff's Motion for Summary Judgment (Document #40) ("Defendants' Mem."), Exhibit ("Ex.") A (Answer to Amended Complaint bearing certification that a copy was mailed to Plaintiff on 10/9/02), Ex. B (Cover Letter from Nancy E. Giorgi to Clerk of 10/9/02, indicating enclosure of "Answer and/or Counterclaim"), Ex. C (Fax Transmission cover sheet from Nancy E. Giorgi to Kathleen Powers Daniels dated 10/9/02, indicating transmission of "amended answer"). This was well within the twenty days specified by the court's October 1, 2002, order. See Memorandum and Order Granting Plaintiff's Second Motion to File Amended Complaint (Document #10) ("Memorandum and Order dated 10/1/02"). Although Defendants concede that the docket does not reflect receipt and entry of the October 9, 2002, Answer to Amended Complaint, they contend that "Plaintiff was served with the Answer to the Amended Complaint in accordance with Federal Rules and was on notice of the Defendants['] affirmative defenses prior to other proceedings. Furthermore, the record can be corrected by supplying the Court with a second copy of the October 9, 2002[, ] Answer." Defendants' Mem. at 3.

Even assuming that Plaintiff did not receive the copy of the answer to the Amended Complaint, the evidence presented by

Defendants would certainly warrant this court exercising its discretion to allow the Answer to the Amended Complaint to be filed *nunc pro tunc*.<sup>3</sup> However, such action is unnecessary as the court has already determined that Plaintiff's claims lack merit, see Report and Recommendation dated 5/9/03 at 23, and therefore, the Motion should be denied.

### **Conclusion**

For the foregoing reasons, I recommend that Plaintiff's Motion for Summary Judgment, which the court treats as a motion for default, be denied. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

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David L. Martin  
United States Magistrate Judge  
May 15, 2003

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<sup>3</sup> *Nunc pro tunc* is a Latin expression which means "now for then." In this context, it means that the court could authorize Defendants to file a duplicate of their Answer to Amended Complaint now, and this document would be treated as if it had been filed within the twenty days specified by the Memorandum and Order dated 10/1/02.

